Ong Tok How & Anor v Madam Ong Lay Eng @ Ong Lay Ien (Proposed administrator/ Administrator for Ooi Koe Ley, wife of the deceased) & Ors

HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 22–208 OF 2004
SEE MEE CHUN JC
2 SEPTEMBER 2010

Trusts and Trustees — Land — Claim by beneficiary of estate for account on amounts received by defendants, rent and restitution — Whether there was breach of trust or fiduciary duty — Whether fraud proved — Limitation — Whether period of limitation of six years applied — Limitation Act 1953 s 22

When Ooi Kim Chin ('the deceased') passed away intestate, his son, the late Ooi Koe Ley ('OKL') applied for and obtained letters of administration in respect of his father's estate. The deceased's estate was distributed and transferred according to a letter of consent signed by the Ooi siblings including OKL and his sister Ong Lian Choo ('OLC'). The said letter of consent stated, inter alia, that the deceased's property which included certain pieces of land situated in Kedah ('the land') would be transferred to OKL to the extent of three-quarters share and OLC to the extent of one-quarter share. This letter of consent also formed the basis of a court order dated 15 September 1982. OKL, the administrator of the deceased's estate, died on 1 May 2001 and his wife ('the first defendant') obtained letters of administration on OKL's estate. On 9 November 2004 OLC commenced the present action against the first defendant, as the administrator of the late OKL's estate, claiming a breach of trust and fiduciary duty. However, OLC died after the present suit was filed and her two sons were substituted for her as the plaintiffs. By way of this action, the plaintiffs claimed an order for account on the amounts received by the defendants, rent and restitution. The plaintiffs claimed that the first defendant had failed to pay the rents collected from the land to the plaintiffs from 1989, which was the date of the grant of letters of administration, and had acted in breach of her duties as trustee by keeping all the rentals received for her own benefit. The defendants pleaded limitation as a defence but the plaintiffs submitted that since their claim was in respect of trust property, which was governed by s 22 of the Limitation Act 1953 ('Act'), the period of limitation of six years did not apply.

Held, dismissing the plaintiffs' claim with costs:

(1) Since the plaintiffs' claim of breach of fiduciary duty lay in the realm of the law of trusts, it came under s 22 of the Act for which there was no period of limitation (see para 6).

(2) As the plaintiffs had alleged non-payment of the rental collected by OKL they had to prove it. However, the tax returns relied upon by the plaintiffs as proof of non-payment did not show whether the plaintiffs had been paid their share of the rental or not. Further income tax returns were not a complete income tax declaration by OKL. In any case, if OCL had not been paid her share of the rental she would have taken some action but in the present case there was no evidence of such action being taken. Thus, the plaintiffs had not proved that they were not paid and accordingly no breach of trust or fiduciary duty had been committed in respect of the rental from the land (see paras 7–9, 11, 12, 14 &16).

(3) The claim for restitution to a half share of the land rested on fraud and equity and the manner in which the deceased's estate was distributed. Although the plaintiffs submitted that they were not challenging the court order dated 15 September 1982, which was based on a letter of consent signed by all the deceased's children, the allegation that the letter of consent was suspect amounted to a challenge of the said court order. In any case, short of expert evidence there was only conjecture as to the genuineness of OCL's signature on the said letter of consent. Thus it was found that the plaintiffs had not established the high degree of probability required to say that there had been fraud. With the allegation of fraud not proved there was no abuse of the position of trustee or breach of fiduciary duty (see paras 18–21 & 25).

(4) As the plaintiffs had not proved breach of trust or fiduciary duty or fraud in their claim, it followed that the relief for an order into inquiry of assets and account on assets must necessarily fail (see para 29).

[Bahasa Malaysia summary

Apabila Ooi Kim Chin ('si mati') meninggal dunia tanpa berwasiat, anak lelakinya, mendiang Ooi Koe Ley ('OKL') memohon untuk dan mendapatkan surat-surat kuasa mentadbir berkaitan estet bapanya. Estet si mati dibahagikan dan dipindah milik mengikut surat keizinan yang ditandatangani oleh adik-beradik Ooi termasuk OKL dan adik perempuannya Ong Lian Choo ('OLC'). Surat keizinan tersebut menyatakan, anatara lain, bahawa hartanah si mati yang mana termasuk tanah-tanah tertentu yang terletak di Kedah ('tanah tersebut') akan dipindahmilik kepada OKL syer sebanyak tiga perempat dan OCL syer sebanyak satu perempat. Surat keizinan ini juga membentuk asas perintah mahkamah bertarikh 15 September 1982. OKL, pentadbir estet si mati, meninggal dunia pada 1 Mei 2001 dan isterinya ('defendant pertama') memperolehi surat-surat kuasa mentadbir estet OKL. Pada 9 November 2004, OLC memulakan tindakan ini terhadap defendan pertama, sebagai pentadbir estet mendiang OKL, menuntut kemungkiran amanah dan tugas fidusiari. OLC walau bagaimanapun meninggal selepas tindakan ini difailkan dan kedua-dua anak lelakinya digantikan untuk dia sebagai plaintif-plaintif. Melalui tindakan ini, plaintif-plaintif menuntut perintah untuk akaun atas

jumlah yang diterima oleh defendan-defendan, sewa dan pemulangan. Plaintif-plaintif menuntut bahawa defendan pertama gagal membayar sewa-sewa yang dipungut daripada tanah tersebut kepada plaintif-plaintif dari tahun 1989, yang mana adalah tarikh pemberian surat-surat kuasa mentadbir, dan bertindak memungkiri tugas-tuganya sebagai pemegang amanah dengan memegang kesemua bayaran sewa yang diterima untuk faedahnya sendiri. Defendan-defendan memplid had masa sebagai pembelaan tetapi plaintif-plaintif berhujah bahawa memandangkan tuntutan mereka adalah berkaitan hartanah amanah, yang dikawal oleh s 22 Akta Had Masa 1953 ('Akta'), tempoh had masa enam tahun tidak beraplikasi.

Diputuskan, menolak tuntutan plaintif-plaintif dengan kos:

(1) Memandangkan tuntutan plaintif-plaintif terhadap kemungkiran tugas fidusiari bergantung dalam bahagian undang-undang amanah, ia terangkum di bawah s 22 Akta yang mana tidak terdapat tempoh had masa (lihat perenggan 6).

(2) Memandangkan plaintif-plaintif telah mendakwa ketidakbayaran sewa yang dipungut oleh OKL mereka mesti membuktikannya. Walau bagaimanapun, pulangan cukai yang digunapakai oleh plaintif-plaintif sebagai bukti tidak bayar tidak menunjukkan sama ada plaintif-plaintif telah dibayar syer sewa mereka atau tidak. Selanjutnya pendapatan pulangan cukai bukan perisytiharan pendapatan cukai yang lengkap oleh OKL. Walau bagaimanapun, jika OCL tidak dibayar syer sewanya dia mungkin akan mengambil tindakan tetapi di dalam kes ini tidak terdapat keterangan mengenai tindakan sedemikian diambil. Oleh itu, plaintif-plaintif tidak membuktikan bahawa mereka tidak dibayar dan oleh itu tiada kemungkiran amanah atau tugas fidusiari dilakukan berkaitan sewa daripada tanah tersebut (lihat perenggan 7–9, 11, 12, 14 &16).

(3) Tuntutan untuk pemulangan terhadap sebahagian syer tanah terletak atas fraud dan ekuiti dan cara di mana estet si mati dibahagikan. Walaupun plaintif-plaintif berhujah bahawa mereka tidak mencabar perintah mahkamah bertarikh 15 September 1982, yang berasaskan surat keizinan yang ditandatangani oleh kesemua anak-anak si mati, dakwaan bahawa surat keizinan adalah diragui sama seperti pencabaran perintah mahkamah tersebut. Walau bagaimanapun, kekurangan keterangan pakar hanya tekaan terhadap ketulenan tandatangan OCL atas surat keizinan tersebut. Oleh itu, ia didapati bahawa plaintif-plaintif tidak membuktikan tahap tinggi kebarangkalian yang dikehendaki untuk menyatakan bahawa terdapat fraud. Dengan dakwaan fraud tidak dibuktikan tidak terdapat salah guna kedudukan pemegang amanah atau kemungkiran tugas fidusiari (lihat perenggan18–21 & 25).

(4) Memandangkan plaintif-plaintif tidak membuktikan kemungkiran amanah atau tugas fidusiari atau fraud di dalam tuntutan mereka, oleh itu relief untuk perintah menyiasat mengenai aset-aset dan akaun atas aset-aset adalah gagal (lihat perenggan 29).]

Notes

For a case on claim by beneficiary of estate, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) para 2361.

Cases referred to

Chu Choon Moi v Ngan Sew Tin [1986]1 MLJ 34, SC (refd)
Koh Ying Huat v Koh Kah Hing Sdn Bhd [1994] 3 CLJ 777, HC (refd)
Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene [1995] 1 MLJ 115; [1995] 1 CLJ 875, HC (refd)
Satish Jayantilal Shah v Pankaj Mashruwala [1996] Cri LJ 3099 (refd)
Siaw Kim Seong v Siew Swee Yin (f) & Anor [2009] 1 MLJ 349, CA (refd)
Yeo Chu Hui v Lim Cheng Jin [1993] 3 CLJ 432, HC (refd)

Legislation referred to

Evidence Act 1950 s 73(1)
Limitation Act 1953 ss 20, 22, 22(1)

T Jegadeeson (Jega Kumar & Partners) for the plaintiff.
C Shanmugiah (C Shanmigiah & Co) for the defendant.

See Mee Chun JC:

BACKGROUND

[1] The original plaintiff in this case was Mdm Ooi Lian Choo who was the sister of Ooi Koe Ley ('OKL'). Their father Ooi Kim Chin passed away intestate on 4 December 1948. OKL obtained letters of administration as administrator of his father's estate on 8 February 1960. OKL was the husband of the first defendant. OKL died on 1 May 2001 and the first defendant obtained letters of administration on OKL's estate on 31 July 2001. Mdm Ooi Lian Choo died on 11 May 2007 after the present suit was filed and her two sons were substituted for her as the plaintiffs.

[2] The claim can be summarised as follows:

(a) order for account, inquiry into assets and account on amounts received by the defendants;

(b) claim on share of rental proceeds from 1989 (prayer d) and repayment of rental collected since the grant of letters of administration (prayer g);

(c) rental proceeds for 12 years from first defendant as administrator of OKL's estate (prayer j); and

(d) restitution to 1/2 share of properties (prayer k).

The property in respect of the claim are GM 4082, 4665, 4969, 4970, 5235 and 5237, all in Mukim Sala Besar, Daerah Yan, Kedah ('the said lands'). It is not disputed that the plaintiffs have a 1/4 share on the said lands. The defendants have collectively 3/4 share.

LIMITATION

[3] The suit was filed on 9 November 2004.

[4] The defendants have pleaded limitation in that the claim from 1989 has exceeded six years referring to s 20 of the Limitation Act 1953 [Act 254]. In response by way of further clarification, the plaintiffs submitted that s 22 of Act 254 applies where there is no limitation in fraud where the trustee is a party. Alternatively the claim pertains to land for which time limit is 12 years and where fraud can be established, limitation starts from when the fraud was discovered.

[5] In respect of trust property, the limitation periods which govern actions undertaken by a plaintiff is prescribed in s 22 of Act 254. Section 22(1) states as follows:

> Limitation of actions in respect of trust property
>
> 22 (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action —
>
> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use

[6] Hence in the situation of fraud or fraudulent breach of trust to which the trustee is a party to or to recover the proceeds of trust property, there is no period of limitation. The cases of *Yeo Chu Hui v Lim Cheng Jin* [1993] 3 CLJ 432, *Loo Cheng Suan Sabrina v Khoo Oon Jin Eugene* [1995] 1 MLJ 115; [1995] 1 CLJ 875 and *Koh Ying Huat v Koh Kah Hing Sdn Bhd* [1994] 3 CLJ 777 are ample authorities to this effect. Thus in *Yeo Chu Hui* it was held that:

> The prayers in the statement of claim fall under the purview of s 22(1) of the Act and not under s 6(1) of the Act and as such no period of limitation applies. Section 22(1) is an exception to s 6(1) of the Act ….

The plaintiffs claim of breach of fiduciary duty by OKL and the first defendant lies in the realm of law of trusts and come under s 22(1) of Act 254 for which there is no period of limitation.

MERITS OF CLAIM

Claim for rent

[7] The claim for rent under prayer (d), (g) and (j) is premised on breach of trust and fiduciary duty (paras 23 and 24 of statement of claim) and fraud (para 26).

[8] On payment, the plaintiffs who are alleging non-payment has to prove its assertion.

[9] OKL tax returns (P 27-P37) was the plaintiffs' evidence to prove they had not been paid. It was also the basis of calculation of rent proceeds due to the plaintiffs. At best these documents show collection of rent. It does not show whether the plaintiffs had been paid or otherwise. Further this is not a complete income tax declaration form of OKL. The suggestion put to DW1 that if her late husband had paid the plaintiffs he would have claimed it as expenses in his income tax is not tenable for these reasons — income tax returns not complete and not indicative of payment or otherwise.

[10] It is the evidence of the defendants through the defendant witness 1 (DW1— first defendant and wife of OKL) that the original plaintiff would come to her house to collect the rent proceeds (usually in cash) from her late husband, the original plaintiff eldest brother. DW1 was not aware of any records kept as her late husband managed the entire matter.

[11] The plaintiff witness 1(PW1— first plaintiff and son of original plaintiff) had stated his mother had not sent any notices of demand. If indeed the original plaintiff had not been paid, she would have taken some action. Granted she was illiterate she would at least be aware that she had inherited substantial property from her late father and that rental was being collected from the many premises thus necessitating some form of action.

[12] It is thus the court's finding that the plaintiffs have not proved they were not paid and accordingly no breach of trust nor fiduciary duty has been committed.

[13] On the alleged fraud at para 27, the plaintiffs claimed that the first defendant:

(a) failed to pay according to the plaintiffs' share;

(b) kept all the payments received and utilised them for own benefit, in breach of her duties as trustee; and

(c) misused her position as trustee.

[14] Although particularised separately they all stem from the failure to pay and hence will dealt with together. The evidence to failure to pay has been considered earlier under breach of fiduciary duty where I found no breach.

[15] It will be the same finding here more so where the degree of proof of fraud carries with it a high degree of probability. On degree of proof the then Supreme Court case of *Chu Choon Moi v Ngan Sew Tin* [1986]1 MLJ 34 at p 38 stated as follows:

> We agree that fraud whether made in civil or criminal proceeding must be proved beyond reasonable doubt and cannot be based on suspicion and conjecture. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The degree of proof need not reach certainty but it must carry a high degree of probability. What it means is that the evidence adduced is such that the court or a prudent man considers its existence probable in the circumstances of the case.

[16] On the evidence the plaintiffs have not proved to a high degree of probability they were not paid.

[17] The allegation of misuse of position as trustee will be dealt under the claim for restitution as it hinges on the distribution of OKL and the original plaintiff's father estate.

Claim for restitution

[18] The claim for restitution to 1/2 share on the said land rests on fraud and equity. One has to go back to the distribution of Ooi Kim Chin's estate (the father of OKL and the original plaintiff). On 9 October 1979 a letter of consent (P4) was signed by the Ooi siblings including OKL and the original plaintiff. The original plaintiff signed using Chinese characters. This letter of consent pertained to the distribution and transfer of Ooi Kim Chin's estate. The part relevant to this claim stated that the lots of land as particularized (which is the said land) were to be transferred to:

(a) Ooi Koe Ley (OKL) to the extent of 3/4 share; and

(b) Ooi Lian Choo (original plaintiff) to the extent of 1/4 share.

[19] This letter of consent formed the basis of a court order dated 15 September 1982 (D40). OKL as administrator was to distribute and transmit

the assets of his late father in accordance with the terms of the letter of consent. This would mean in respect of the said land, OKL would have 3/4 share and the original plaintiff 1/4.

[20] The plaintiffs' counsel says he is not challenging the court order but that the steps taken by OKL in procuring the order were tainted with fraud. He says that OKL somehow obtained the original plaintiff's signature on the letter of consent. The evidence of PW1 is that his mother rarely signed in Chinese characters, she either signed in English alphabets or thumbprinted. PW1 further stated the only time his mother signed in chinese characters was on an old passport (P8) which according to him is very different to that in the letter of consent.

[21] Although the plaintiff says this is not a challenge of the court order, the allegation that the letter of consent is suspect in fact amounts to a challenge of the court order. This is because the letter of consent formed the basis of the court order. If the letter of consent is invalid for reasons of fraud, that part of the court order on proportion of share in the said land will similarly be invalid. However for all intent the court order is still a good order and likewise the letter of consent.

[22] The degree of proof as stated in *Chu*'s case is a high degree of probability. Earlier at p 36 of the same case the court in relation to the trial judge ruling on the genuineness of a signature said:

> It is not proper to attempt making any conclusion on the genuineness of a signature in a document by comparing two similar handwriting without resorting to the opinion of a handwriting expert who is specialised in this field. It is insufficient to rely on the opinion of an ordinary witness and the more so an interested party …

[23] I also refer to the Court of Appeal case *Siaw Kim Seong v Siew Swee Yin (f) & Anor* [2009] 1 MLJ 349 where Gopal Sri Ram JCA (as he then was) was of the view that the trial judge ought to have compared signatures as allowed by s 73(1) of the Evidence Act. In that case an expert had been called who testified the instrument was a forgery. It was stated at p 354:

> But in this case you do not have to be an expert to see for yourself that the signature supposed to be of the plaintiff appearing on the memorandum of transfer and the assignment do not match even upon a cursory visual examination. In fact the signature said to be that of the plaintiff on the assignment is manifestly different from that appearing on the memorandum of fransfer.

[24] At p 355 of *Siaw*'s case and referring to *Satish Jayantilal Shah v Pankaj Mashruwala* [1996] Cri LJ 3099 it was acknowledged that 'it is true that the court cannot be an expert and base its conclusion merely on comparison of

signatures. *But it can definitely compare the signatures in the light of other admitted evidence on record*'. (Emphasis added).

[25] In this case if I were to compare signatures I would say they look the same. The other evidence on record is that of PW1, an ordinary and interested party, that the original plaintiff rarely signed in chinese characters and there is a difference in how she signed the letter of consent when compared to P8. Short of expert evidence there is only conjecture as to the genuineness of the original plaintiff signature in the letter of consent. I find the plaintiffs have not established the high degree of probability required to say that there has been fraud. With the allegation of fraud not proved there is no abuse of the position of trustee nor breach of fiduciary duty.

[26] PW1 also said that the distribution should have been allocated equally in accordance with the laws on distribution. Counsel thus submitted this would mean the plaintiffs are entitled to 1/2 share. This is a non-issue due to my finding there was no fraud viz a viz the letter of consent. Be that as it may, there were other siblings and it may well have been that the said lands could have been distributed equally among all leaving the original plaintiff with less than 1/4 share.

Claim on shortfall

[27] In respect of this, the defendants maintained these were reasonably and necessarily incurred towards the collection of rent. Although the plaintiffs tried to show otherwise, I accept the evidence of the defendants as the expenses were incurred on 23 shop lots and 23 ground rental. Time, money and energy would have been expended. Although some vouchers (P46 (1–10)) produced by DW2 to support the expenses were partly personal, it was not shown which were the ones.

Claim against the third defendant

[28] In para 22 of the statement of claim it is stated that the third defendant was operating a petrol kiosk on the land for which the plaintiffs claim RM100 a month (1/4 of RM400). There was no evidence as to how this was arrived. This claim has thus not been proved.

CONCLUSION

[29] To conclude, the plaintiffs have not proved breach of trust or fiduciary duty nor fraud in their claim for rent and restitution. It follows that the reliefs

for an order into inquiry of assets and account on assets must necessarily fail. The claim against the third defendant has not been proved. The plaintiffs' case is dismissed with costs.

Plaintiffs' claim dismissed with costs.

Reported by Kohila Nesan.